Supreme Court, U.S.
FILED
JUN 8 2016
OFFICE OF THE CLERK

No. 15-777

IN THE

# Supreme Court of the United States

SAMSUNG ELECTRONICS CO., LTD., *et al.*,

*Petitioners,*

*v.*

APPLE INC.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## BRIEF OF *AMICUS CURIAE* INDUSTRIAL DESIGNERS SOCIETY OF AMERICA IN SUPPORT OF NEITHER PARTY

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## INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae Industrial Designers Society of America (IDSA) is the largest and one of the oldest membership associations for industrial design professionals.[2] The nonprofit IDSA is dedicated to improving industrial design knowledge and representing the industrial design profession to businesses, the government, and the public. IDSA has thousands of members in dozens of Student Chapters, Professional Chapters, and Special Interest Sections in the United States and internationally. IDSA also sponsors the annual International Design Excellence Awards® (IDEA), one of the world's most prestigious and rigorous design competitions. IDSA has a strong interest in offering advice to the Court on the importance of the protections that Section 289 provides to industrial designers, innovative companies, and ultimately society as a whole. IDSA respectfully submits this brief for the benefit of the Court and in specific support of neither party.

## SUMMARY OF THE ARGUMENT

Industrial design and industrial designers are important to companies, consumers, and society.

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1. No counsel for a party authored the brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3(a), all parties received appropriate notice of and consented to the filing of this brief.

2. *About IDSA*, http://www.idsa.org/about-idsa.

Industrial designers design virtually all types of articles of manufacture and help to drive innovation. Consumers make product purchasing decisions based on the appearance of product designs. Companies that invest in industrial design are more successful than those that do not.

Section 289 is clear and its literal language requires that a design patent infringer is liable for his total ill-gotten profit, without apportionment. Congress's intent was clear in trying to correct problems associated with then-existing court decisions that required apportionment. If the law is to be changed at all, which it should not be, it is up to Congress, not this Court, to revise Section 289.

Section 289 affords important protections. Weakening Section 289 would eliminate the deterrent effect provided by the United States design patent laws that has encouraged companies to innovate and create new designs of their own – a regime under which industrial design has flourished. The loss of a meaningful deterrent would cause a rise in copies at the sacrifice of new and innovative designs. Meaningful exclusivity and differentiation of new and innovative designs in the marketplace would suffer. A weakened Section 289 would devalue designs and industrial designers as companies face lower returns on their design investment. Negative effects would also likely be felt by consumers and the broader economy.

## ARGUMENT

### I. INDUSTRIAL DESIGN IS IMPORTANT AND NEEDS TO BE PROTECTED AS CONGRESS INTENDED

Industrial designers design manufactured products in a whole host of product categories, including automotive and transportation, children's products, computer equipment, kitchen, medical and scientific products, sports, leisure and recreation, and numerous others.[3] In a nutshell, industrial designers design all types of articles of manufacture—from everyday commodities to durable extravagances. Designers combine creativity, business, and engineering talent with information on product use, marketing, and materials of construction to create the best and most appealing designs, and to make the product competitive with others in the marketplace.[4]

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3. *See IDEA 2016 Categories*, Industrial Designers Society of America – IDSA, http://www.idsa.org/idea-2016-categories. Other product categories include commercial and industrial products, communication tools, digital design, entertainment, environment, home and bath, office and productivity, outdoor and gardens, packaging and graphics, personal accessories, research, service design, and social impact design. *Id.*

4. *See* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2016-17 Edition*, Industrial Designers, http://www.bls.gov/ooh/arts-and-design/industrial-designers.htm; *see also* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 1992-93 Edition*, Issue 2400, Industrial Designers, 173-74 (1992).

Industrial designers create products that optimize appearance, function, and value.[5] Industrial design helps make products more aesthetically pleasing, more compelling to use, and more relevant in a world that seems to change at an ever-increasing rate.[6] It is indisputable that consumers purchase products based in large part on their designs. "[I]n the face of increasing competition, design is often the only product differentiation that is truly discernable to the buyer."[7] "With assurance that competing products perform equally well enough, last equally long enough, and cost about the same, we can afford to purchase them on aesthetic grounds alone."[8] For example, in the automotive field, "[r]eliability, braking, steering, handling, ride, and refinement are all largely on par across automakers and segments. That leaves just one chief differentiator: design."[9]

Aesthetic contributions by industrial designers are not just the lynchpin for purchases of similarly performing

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5. *See What is Industrial Design?*, Industrial Designers Society of America – IDSA, http://www.idsa.org/education/what-is-industrial-design.

6. Jeneanne Rae, *What Is the Real Value of Design*, DESIGN MANAGEMENT INSTITUTE 33 (Winter 2013).

7. Dieter Rams, *Dieter Rams on Good Design as a Key Business Advantage*, http://www.fastcodesign.com/1669725/dieter-rams-on-good-design-as-a-key-business-advantage. Trademark branding can also contribute to consumer choice.

8. Del Coates, *Watches Tell More than Time* 32 (2003).

9. *See* Bob Lutz, *Driven by Design*, Road and Track, 108 (Sept. 2015) (the "one chief differentiator [in the automobile industry is] design").

products; consumers often pay a premium for product beauty.[10] For example, "[p]eople pay thousands of dollars more for superior appearance in a car, or even a watch, above and beyond either product's practical value."[11] "Computers and other high-tech products also fall increasingly into the same category."[12] America's middle market consumers are willing to pay premiums of 20% to 200% for the kinds of well-designed, well-engineered, and well-crafted goods—often possessing the artisanal touches of traditional luxury goods – for products in many sectors including automobiles, home furnishings, appliances, consumer electronics, and shoes and other apparel.[13]

In today's world, companies must focus on industrial design in order to be successful or profitable.[14] While the Standard & Poor's 500 Index grew 75 percent from 2003 to 2013, companies determined to be on a "Design-Centric Index" grew an astonishing 299 percent over the same 10 year span and outperformed the S&P 500 Index by 228%.[15] Other research further confirms the long-held belief that

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10. Del Coates, *supra* note 8.

11. *Id.*

12. *Id.*

13. Michael J. Silverstein & Neil Fiske, *Luxury for the Masses*, Harvard Business Review (April 2003), https://hbr.org/2003/04/luxury-for-the-masses.

14. Dieter Rams, *supra* note 7; Jeneanne Rae, *supra* note 6.

15. Jeneanne Rae, *supra* note 6. Companies included in the Design-Centric Index were weighed against six different criteria. *Id.* at 32.

design-conscious firms are more successful.[16] Indeed, IDSA estimates that every $1 spent on design results in an average $2,500 in sales for companies with sales under $1 billion, and $4,000 for those with sales over $1 billion.[17] The reach of design extends not just to large companies, but also to startups.[18] Because designers' contributions impact product sales and a company's ability to compete, it is an inescapable conclusion that industrial designers impact the American economy and civil society.[19]

Additionally, creativity often begets innovation and invention. According to data from the United States Patent and Trademark Office (USPTO), approximately 40 percent of inventors named on design patents were also

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16. Marjorie B. Platt et al., *Valuing Design: Enhancing Corporate Performance through Design Effectiveness*, 12 Design Management Journal 3, 12 (Summer 2001) ("There is evidence that companies that invest in design tend to launch or profitable products and boast higher returns at the firm level"); *see also* Julie H. Hertenstein et al., *The Impact of Industrial Design Effectiveness on Corporate Financial Performance*, 22 J. Prod. Innov. Manag. 3, 17 (2005) ("firms rated as having 'good' industrial design are stronger on virtually all measures").

17. Roxane Farmanfarmaian, *Does Good Design Pay Off?*, Working Woman, July 1985, 47.

18. *See* Johan Persson, *Here is how design can drive shareholder value: My top 5 arguments*, LinkedIn (Apr. 13, 2016), https://www.linkedin.com/pulse/here-how-design-can-drive-shareholder-value-my-top-5-johan-persson.

19. *See* Bonnie Nichols, *Valuing the Art of Industrial Design*, National Endowment for the Arts, Research Report #56, 4 (Aug. 2013).

named on utility patents.[20] That is, industrial designers not only drive aesthetic innovation, they also materially contribute to technological innovation. Given the economic significance of design, it is no wonder that there are more than 40,000 industrial designers practicing in the United States.[21]

Notably, the economic engine of industrial design developed under the existing framework of the Patent Act Section 289 and its predecessor statute, where the clear statutory language and consistent precedent for over a century requires the award of total infringer's profits *without apportionment*, because apportionment is inexact, difficult, and costly to prove. *See Dobson v. Dornan*, 118 U.S. 10 (1886). Importantly, this remedy is rooted in principles of equity that assign a potential over-payment to the infringer in the form of relinquishing all its ill-gotten gains, rather than penalize the designer through inexact and costly deductions by apportionment. *See id.* On this point, Congress was clear in its language and in its intent.

## II. IT IS UP TO CONGRESS, NOT THIS COURT, TO MAKE ANY CHANGE TO SECTION 289 BASED ON ITS LITERAL LANGUAGE AND LEGISLATIVE HISTORY

Whoever "sells or exposes for sale any article of manufacture to which [the patented] design or colorable

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20. *Id.* at 5.

21. *Id.* at 17. As of 2015, the median pay of industrial designers was over $67,000. Bureau of Labor Statistics, *Occupational Outlook Handbook, 2016-17 Edition*, *supra* note 4.

imitation has been applied shall be liable to the owner ***to the extent of his total profit***, but not less than $250." 35 U.S.C. § 289 (2012) (emphasis added). Whether infringer's profits should be apportioned is not a new question. Congress answered in 1887 with an emphatic "no." *See* Act of Feb. 4, 1887, Ch. 105, § 1, 24 Stat. 387 (hereinafter "Act of 1887"). Notably, Congress passed the Act of 1887 providing infringer's total profits to eliminate an apportionment requirement for infringer's profits that had been established by the courts. The provisions of the Act of 1887 remain substantively unchanged and exist in present form in Section 289.

In 1884, the Supreme Court held that a patentee could recover only the infringer's profits attributable to the patented feature, and not the profits attributable to the article itself. *Garretson v. Clark*, 111 U.S. 120, 121 (1884) (the patentee "must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features"); *see also Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1441 (Fed. Cir. 1998) (describing *Garretson v. Clark*). In what has become known as the "Carpet Cases," four lawsuits were brought in the 1870s against carpet makers (the Dobson brothers) for infringing design patents on carpet designs.[22] The Dobson brothers were quickly found liable

22. For 10 years between 1870 and 1880, approximately 45% of all granted design patents were for carpets and rugs. Jason J. Du Mont and Mark D. Janis, *American Design Patent Law: A Legal History, Ch. 6 Design Patent Remedies*, 12-15 (May 26, 2016), *available at* http://ssrn.com/abstract=2784746.

for infringement in all four cases.[23] The major question that remained was damages.

Culminating in a series of decisions in the Carpet Cases by the Supreme Court in 1885 and 1886, the Court held that the infringers of patented designs for carpets were liable for only nominal damages of six cents because the patentees could not prove which portion of the infringer's profits was attributable to the design, and which portion was attributable to the carpet itself. *See Dobson v. Dornan*, 118 U.S. 10 (1886) (requiring a showing of the amount of the defendant's profits due to infringement of the protected design); *see also Dobson v. Hartford Carpet Co.*, 114 U.S. 439 (1885); *Dobson v. Bigelow Carpet Co.*, 114 U.S. 439 (1885). These decisions left design patentees without any meaningful remedies.[24]

Congress responded by passing the Act of 1887 to overrule the apportionment requirement established in the Carpet Cases and to provide an effective remedy for design patent infringement.[25] The accompanying House

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23. *See id.* at 15, 19. The Dobson brothers were painted as willful copyists, and the brothers offered little resistance to these allegations, even being called "infringers, by profession." *See id.* at 17. Moreover, the Dobsons conceded to infringement in one case, failed to answer complaints in two cases, and were subject to a preliminary injunction (and eventually found to infringe in a court order) in the fourth case. *See id.*

24. *See* S. Rep. No. 49-206, at 2-3 (1886).

25. *See* Act of Feb. 4, 1887, Ch. 105, § 1, 24 Stat. 387; *see also* H.R. Rep. No. 49-1966, at 1 (1886) ("It now appears that the design patent laws provide no effectual money recovery for infringement.").

Report explained that "[i]t is expedient that the infringer's entire profit on the article should be recoverable," for "it is not apportionable," and "it is the design that sells the article." H.R. Rep. No. 49-1966, at 2-3 (1886); *see also Nike*, 138 F.3d at 1442 ("The difference for design patents, as enacted in 1887, was the removal of the need to apportion the infringer's profits between the patented design and the article bearing the design."). The Senate Report argued that failure to pass the bill would "virtually repeal the design patent laws" and that the situation was an "emergency." S. Rep. No. 49-206, at 2-3 (1886). "[T]he House and Senate reports are definitive in their rejection of an apportionment requirement." Du Mont, *supra* note 22, at 39. The provisions from the Act of 1887 have not substantively changed, and are now codified in Section 289: whoever "sells or exposes for sale any article of manufacture to which [the patented] design or colorable imitation has been applied shall be liable to the owner ***to the extent of his total profit***, but not less than $250." 35 U.S.C. § 289 (emphasis added).

Because awarding total profits on the entire infringing product under Section 289, without apportionment, is clear from both the literal language of Section 289 and the legislative context of Section 289, any revision to Section 289 to add an apportionment requirement should be made by Congress, not the courts. *See Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 458-459 (2007) ("If patent law is to be adjusted ..., the alteration should be made after focused legislative consideration, and not by the Judiciary").

## III. WEAKENING SECTION 289 WOULD ELIMINATE ITS DETERRENT EFFECT

To the extent Section 289 is interpreted in any way that varies from its clear meaning, it must not be weakened to eliminate its deterrent effect. Congress established Section 289 in 1887 in response to the Carpet Cases, where only nominal damages were awarded because of the difficulty in proving an apportioned amount. *See, e.g., Dobson v. Dornan*, 118 U.S. 10 (1886). While the new statute eliminated apportionment to award the total profit from the sale of the infringing article, it also provided a deterrent effect so that third parties would not simulate the designs of others who had protected their designs with design patents.[26]

Under the framework of Section 289, copyists had a choice: either create an original design for a product or simulate the design of a competitor and risk having to turn over all of its ill-gotten gains if caught.[27] Of course, product simulations and knockoffs still occur because the upside of profiting from infringement is often worth the risk to copyists. Copyists hope that they will fully or partially escape liability due to the patentee failing to detect infringement, delays in patent grant by the USPTO, or hurdles imposed on the patentee by the notice/marking statute of Section 287. Despite these product simulations and knockoffs, Section 289 has led most

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26. *See Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1448 (Fed. Cir. 1998) ("[Section 289] requires the disgorgement of the infringers' profits to the patent holder, such that the infringers retain no profit from their wrong.").

27. *See id.*

branded companies to create new and innovative product designs, which in turn has benefitted the companies, consumers, and society.[28]

Section 289 provides the only meaningful deterrent to infringement in the United States design patent laws. Weakening Section 289 contrary to its clear meaning either in the form of a reduced monetary award or in a way that places a higher enforcement burden on the design patentee would only serve to embolden infringers to copy more original designs. It is the deterrent effect of Section 289 that provides the teeth for the exclusive design right, and it is this exclusive right that has caused the growth of designs and the design profession in the United States.

Congress could have chosen a different statutory scheme to serve the deterrent purpose. For example, European design law provides deterrents against infringement by laws that provide upon a finding of infringement: (a) injunctions as a matter of right,[29]

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28. *See* David. J. Kappos, *America Doesn't Do Enough to Protect Its Innovative Designs*, Wired Magazine (Nov. 9, 2015), http://www.wired.com/2015/11/america-doesnt-do-enough-to-protect-its-innovative-designs/ ("Our laws and policies covering design patents play an important role in promoting and protecting that investment. Critically, this includes requiring infringers to pay design patent holders for all damage caused, which discourages infringement and encourages the development of new and innovative designs by providing innovators the opportunity to recover their costs without being undermined by free riders who have not made the same investment. Competitors must instead rely on differentiation and innovation to set themselves apart, further benefitting consumers.").

29. *See* Council Regulation (EC) No 6/2002, amended by Council Regulation No 1891/2006, Art 89.1(a).

(b) award of attorneys' fees to the design right holder as a matter of right,[30] (c) seizure or destruction of the infringing products,[31] and (d) customs enforcement of designs.[32] Indeed, copying the designs of others in the U.K. is a crime that can land the copier in jail.[33] Congress could have chosen any or all of these as its deterrent against design patent infringement, but it chose instead to have the infringer forfeit all of its ill-gotten gains to the design patentee.

Section 289 should be interpreted consistent with its clear meaning and considered in view of the existing statutory scheme that provides the deterrent effect needed in the United States design laws. To the extent

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30. *See* Council Regulation (EC) No 6/2002, amended by Council Regulation No 1891/2006, Art 88.2. Award of reasonable attorneys' fees to the prevailing design right holder is provided under the national laws of the individual Member States, applicable pursuant to Article 89.1, and is made mandatory pursuant to Article 14 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. *See* Directive 2004/48/EC of the European Parliament and of the Council, Art. 14, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0048R(01) ("Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this").

31. *See* Council Regulation (EC) No 6/2002, amended by Council Regulation No 1891/2006, Art 89.1(b)-(c).

32. *See* Regulation (EU) No 608/2013 of the European Parliament and of the Council, whole and Art 2.3(a).

33. Registered Design Act 1949, as amended by the IP Act 2014; Sections ss35ZA to C.

that there is any uncertainty in an infringer's total profits analysis, the burden should fall on the infringer so that the deterrent effect intended by Congress remains as close to fully intact as possible.

Weakening Section 289 in any manner will likely make Section 284 the default remedy for design patentees. Under Section 284, design infringers would only be liable for a reasonable royalty because the "but for" standard associated with lost profits is typically difficult or impossible to prove in many design patent cases where copied products are commonly sold at a lower price than the design patentee's innovative product.[34] Limiting a design patentee's remedy to a reasonable royalty would embolden infringers to copy more designs and copy designs more frequently because having to pay merely a reasonable royalty would likely be treated by the copyists as an acceptable cost of doing business in lieu of actually employing designers and innovating. Moreover, infringers would only have to pay a portion of this cost of doing business in view of the many situations where the patentee fails to detect infringement, the USPTO delays patent grant, or because of hurdles imposed on the patentee by the notice/marking statute of Section 287. With more and more copies, simulations, and knockoffs in the marketplace, companies will be less likely to invest in original designs, and innovation will be stifled.

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34. *See* 35 U.S.C. § 284 (2012); *see, e.g.*, Paul Nunes & Narendra P. Mulani, *Can Knockoffs Knock Out Your Business*, Harvard Business Review (October 2008), https://hbr.org/2008/10/can-knockoffs-knock-out-your-business.

Accordingly, Section 289 needs to have its clear meaning followed to provide the deterrent effect that Congress intended. Section 289 ensures a regime where companies are incentivized to invest in the creation of innovative designs and would-be infringers are disincentivized from copying.

## IV. WEAKENING SECTION 289 WILL NEGATIVELY IMPACT INDUSTRIAL DESIGNERS, INNOVATIVE AND CREATIVE COMPANIES, AND ULTIMATELY STUNT THE GROWTH OF COMMERCE

The visual design of a product often drives product success and plays a critical role in the viability and success of many of America's most innovative companies and industries. A Gallup poll of senior business executives rated industrial design as 60 percent responsible for the success of any new product.[35] The Supreme Court recognized this design to economy connection a long time ago, stating "[t]he law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public."[36] Former President Ronald Reagan, in an exhibition behind the then Iron Curtain, introduced visitors by stating:

> Design is an integral part of our lives and as such reveals a great deal about who we are and what we value as Americans. "Design in

35. Roxane Farmanfarmaian, *Does Good Design Pay Off?*, Working Woman, July 1985, 47.

36. *Gorham Mfg. Co. v. White*, 81 U.S. 511, 525 (1871).

> America" vividly expresses our love of mobility, our respect for ingenuity, and – above all – the creative freedom we so deeply cherish ... Today, designers, manufacturers, and an ever more discerning consumer are joined together in a global network. Design has become an international language, linking the ideas and aspirations of people the world over.[37]

Lee Kun-Hee, chairman of Samsung Group, famously said in 1996 that design would become "the ultimate battleground for global competition in the 21st century."[38] Even an entire museum in the nation's capital is dedicated to "architecture, engineering, and design."[39] Industrial designers are the driving force behind these innovative and successful products.

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37. United States Information Agency, Introduction to "Design in America" (1988) (videotape available through the USIA); *see* Cooper C. Woodring, *A Designer's View of Current Industrial Design Protection in the United States*, 19 U. Balt. L. Rev. 154, 156-157 (1989) (referencing former President Ronald Reagan's quote).

38. Youngjin Yoo & Kyungmook Kim, *How Samsung Became a Design Powerhouse*, Harvard Business Review (September 2015), https://hbr.org/2015/09/how-samsung-became-a-design-powerhouse.

39. National Building Museum, *Telling the Stories of Architecture, Engineering, and Design*, http://www.nbm.org/.

### A. Industrial Designers, Which Number More Than 40,000, Are The Driving Force Behind Innovative And Successful Products

More than 40,000 industrial designers call the United States home.[40] Industrial designers significantly influence a company's identity and help direct the future of the entire company. *The Telegraph* has gone on to call one of these industrial designers, Apple's Jony Ive, the most influential Briton in America.[41] Jony Ive beat out the likes of Tim Berners-Lee (creator of the World Wide Web), Ridley Scott (director of Alien and Blade Runner), Howard Stringer (CEO of Sony), celebrity chef Gordon Ramsay, and celebrity presenters Simon Cowell and Craig Ferguson.[42] Leaders at numerous companies now rely on

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40. Bonnie Nichols, *Valuing the Art of Industrial Design*, National Endowment for the Arts, Research Report #56, 17 (Aug. 2013).

41. *The Most Influential Britons in America*, The Telegraph (Jan. 10, 2008), http://www.telegraph.co.uk/news/uknews/1435096/ThetoptenmostinfluentialBritonsinAmerica.html.

42. *Id.*; *see The Most Influential Britons in America: 20-11*, The Telegraph (Jan. 9, 2008), http://www.telegraph.co.uk/news/uknews/1435097/ThemostinfluentialBritonsinAmerica2011.html; *The Most Influential Britons in America: 30-21*, The Telegraph (Jan. 9, 2008), http://www.telegraph.co.uk/news/uknews/1435099/ThemostinfluentialBritonsinAmerica3021.html; *The Most Influential Britons in America: 40-31*, The Telegraph (Jan. 8, 2008), http://www.telegraph.co.uk/news/uknews/1435100/ThemostinfluentialBritonsinAmerica4031.html; *The Most Influential Britons in America: 50-41*, The Telegraph (Jan. 7, 2008), http://www.telegraph.co.uk/news/uknews/1435101/ThemostinfluentialBritonsinAmerica5041.html.

designers to direct the future of the entire company.[43] Clearly, industrial designers are of vital importance and provide tremendous value to a company because design is the great product differentiator and often controls the company's identity.[44]

### B. Companies Will Devalue Design Because Of Copyists

Weakening Section 289 by adding an apportionment requirement or imparting any additional burdens on the design patentee will embolden copyists to copy designs created by industrial designers at innovative companies. When these innovative companies lose design exclusivity, these companies will compete in the marketplace against their own designs – made by copyists. However, the research and development costs that the innovative companies incur to develop new and creative designs (including the cost of hiring industrial designers) will not be incurred by the copyists. As a consequence, companies employing industrial designers will yield a lower return on

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43. *See* Karl T. Greenfeld, *How Mark Parker Keeps Nike in the Lead*, Wall Street Journal Magazine (Nov. 4, 2015), http://www.wsj.com/articles/how-mark-parker-keeps-nike-in-the-lead-1446689666; Youngjin Yoo & Kyungmook Kim, *How Samsung Became a Design Powerhouse*, Harvard Business Review (Sept. 2015), https://hbr.org/2015/09/how-samsung-became-a-design-powerhouse.

44. *See* Bob Lutz, *Driven by Design*, Road and Track, 108 (Sept. 2015) (the "one chief differentiator [in the automobile industry is] design"); Dieter Rams, *Dieter Rams on Good Design as a Key Business Advantage*, http://www.fastcodesign.com/1669725/dieter-rams-on-good-design-as-a-key-business-advantage.

their design investment, and will have to consider whether to continue to invest in industrial designers, or whether to abandon innovative design, join the ranks of the copyists, and reduce their hiring of industrial designers. Under basic economic principles, the lower return on investment of industrial designers' services will likely result in a reduction in industrial design jobs or lower salaries. This is exactly what Congress was trying to avoid by passing the predecessor statute to Section 289.[45]

Companies will also likely reduce their design patent filings as a result of the lower return on investment in design protection and industrial designers. In the 1880s as a result of the Carpet Cases interpreting the prior statute to include an apportionment requirement as prerequisite to an infringer's profit remedy, "the receipts of the Patent Office in the design department and the average weekly issue of design patents ha[d] fallen off 50 percent."[46] It took the passage of the Act of 1887 to reverse this trend and to save the design industry.[47] If the Supreme Court adds an apportionment requirement to Section 289 or otherwise increases the patentee's enforcement burden, drops in design patent filings and issuances should be expected because creative and innovative companies (and their industrial designers) will no longer have an effective remedy for protecting their designs.

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45. *See* S. Rep. No. 49-206, at 2-3 (1886) (stating that failure to pass the bill would "virtually repeal the design patent laws" and that the situation was an "emergency").

46. *Id.* at 1.

47. *See* Act of Feb. 4, 1887, Ch. 105, § 1, 24 Stat. 387.

### C. Industrial Designers Will Lose Their Jobs

Without effective remedies to prevent the copying of designs, many of the over 40,000 industrial designers will have their jobs at risk, make a lower salary, or voluntarily leave the profession as a result of companies devaluing designs. In other words, the current design patent laws (especially infringer's total profits under Section 289) support industrial design as a profession. Many of these designers will effectively be replaced by copyists if Section 289 is weakened, and the growth of industrial designers at innovative companies, such as Apple and Samsung, may be reversed.[48]

Moreover, because of the likely reduced job prospects for industrial designers, the pool of would-be industrial designers will also likely shrink. There would be fewer financial incentives for students to choose the industrial design profession. The National Association of Schools of Art and Design, which establishes national standards for undergraduate and graduate degrees, has approximately 346 accredited institutional members, with each member having numerous design-focused programs.[49] This is more

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48. "Apple made design its premier strategic weapon from the start." Tom Peters, *The design opportunity*, The Herald (1987). In 2004, Samsung doubled its designers to 470, with its design budget steadily increasing 20-30% each year. *Samsung Design*, Businessweek 48 (Nov. 29, 2004), *available at* http://www.bloomberg.com/news/articles/2004-11-28/samsung-design. Samsung now has over 1,600 designers. Youngjin Yoo & Kyungmook Kim, *supra* note 38.

49. *See National Association of Schools of Art and Design*, National Association of Schools of Art and Design, http://nasad.arts-accredit.org/.

than twice as many accredited design programs than in 1991.[50] Design programs are being introduced every day, and one business expert called design education as "absolutely critical" to "business school education."[51] Fewer job prospects in the industrial design field will likely result in a drop in the number of prospective design students, and ultimately may cause many of these design schools and programs to reduce their offerings or shut their doors altogether.

### D. Growth Of Commerce And The Economy Will Be Stunted

To remain profitable and competitive, companies can pursue one of two strategies: a "shrinking" strategy by "aggressively shrinking operations and cutting costs" or a "growth" strategy achieved by developing new products through innovative design.[52] Weakening Section 289 will eliminate the primary tool to ensure that creative

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50. In 1991, NASAD listed 166 accredited members. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 1992-93 Edition*, Issue 2400, Industrial Designers, 173-74 (1992).

51. *Business Week's Bruce Nussbaum on Design*, @Issue, 4 J. Bus. & Design 1, 4 (1998). "Bruce Nussbaum is the author of Creative Intelligence." *Author Page, Bruce Nussbaum*, Fast Company & Inc., http://www.fastcodesign.com/user/bruce-nussbaum. Large corporations, such as Samsung, are even bringing in faculty from well-known design schools to rigorously train their designers and engineers. *See* Youngjin Yoo & Kyungmook Kim, *supra* note 38.

52. *Business Week's Bruce Nussbaum on Design*, *supra* note 51, at 3-4.

and innovative companies can follow a growth strategy. As a result of copyists no longer being deterred from copying the designs of others, some companies may choose to return to the age of reduction and cost-cutting.[53] According to Bruce Nussbaum, it is not clear if these companies will even be able to return to such an era of "shrinking, streamlining and tightening."[54] In this type of economy, product differentiation by design will lessen, and fewer new and creative products will be introduced into marketplace. Copyists will reap the rewards, while designers sit on the sidelines.

The prevalence of copyists will harm everyone from industrial designers to corporations that employ their services. The job market for industrial designers will likely contract. Startups, which significantly rely on industrial designers and the deterrent effect afforded by Section 289,[55] will falter and fail more often. Small to medium-sized businesses, which form the backbone of the United States economy, will not be able to continue developing new and innovative products because of the looming threat of copyists.[56] Large design-driven

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53. *See id.*

54. *See id.*

55. Brady Forrest, Vice President of a hardware startup accelerator, argues that "[t]he selection of an industrial designer is incredibly important to the future of your company, because they become a partner in product development." *See* Diana Budds, *Ideo, Astro, And Whipsaw: What Every Startup Should Know About Design* (May 31, 2016), http://www.fastcodesign.com/3060300/ideo-astro-and-whipsaw-what-every-startup-should-know-about-design.

56. *See* Paul Sarvadi, *Small Business Is the Backbone of America*, Entrepreneur (Apr. 27, 2005), https://www.entrepreneur.

corporations may also be forced to shrink operations and cut costs in order to remain profitable. As a result of these reductions, growth of commerce and the economy will be stunted. As David Kappos, former Under Secretary of Commerce for Intellectual Property and Director of the USPTO, wrote:

> To promote great design, the law must afford meaningful protection for designers' work. As a discipline, design creates usability in a world that otherwise cannot obtain benefit from much of today's product and service capabilities. Great design means great products, which means great experiences for consumers, and great productivity for society. To maintain America's lead in this field, it is critical that we continue to incentivize investment in great design by ensuring that our design protection laws remain strong.[57]

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com/article/77398 ("Innovation and job creation are the foundation of a healthy economy. In the United States, we rely on the small-business community for both of these precious resources.... The nation's small-business community is a vital source of competition, which forms the foundation for innovation.").

57. David. J. Kappos, *America Doesn't Do Enough to Protect Its Innovative Designs*, Wired Magazine (Nov. 9, 2015), http://www.wired.com/2015/11/america-doesnt-do-enough-to-protect-its-innovative-designs/.

## CONCLUSION

Amicus IDSA submits that the express language, legislative history, and precedent of Section 289 require that a design patent infringer shall be liable to the extent of its total profit, without apportionment. Because this is precisely what Congress intended when it wrote the law and because a robust national economy has developed under this regime, weakening Section 289 would eliminate the deterrent effect in the design patent law, likely increase design product copies, reduce innovation, reduce the value of industrial design and industrial designers, reduce product differentiation, and have other negative impacts. For at least these reasons, this Court should not require apportionment or impose burdens on design patentees that would weaken Section 289.

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June 8, 2016